In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1939

No. 127

J. E. RILEY INVESTMENT COMPANY (a corporation), HARRY P. SHEPPARD and HARRY DONNELLEY,

Petitioners,

vs.

WALTER SAKOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

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vs.

WALTER SAKOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners* pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals

*Petitioners are referred to herein as defendants; and respondent as plaintiff. All italics in this petition and brief are ours.

for the Ninth Circuit entered into the above entitled cause on 14th day of March, 1940.

OPINIONS BELOW.

In this case there have been two appeals, petitioners being appellants, in each instance. The opinion, in the first appeal, is reported in 98 Fed. (2d) 38. The second appeal is not yet reported. It will be found in Vol. I of the record, p. 446. It is also set out in the appendix, pp. i-vi.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 14th day of March, 1940. A petition for rehearing was filed within the prescribed time and denied on the 3rd day of May, 1940. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

This is an action in ejectment to determine title and right to possession of an unpatented placer mining claim brought under Chapter XCIX, Compiled Laws of Alaska, 1933, p. 753. The action was instituted in the District Court of the Territory of Alaska, Fourth Division.

Plaintiff's contention.

Plaintiff claims that he is the owner and entitled to the possession of the Good Hope placer mining claim, alleged, in his amended complaint, to be situated in the first tier of benches, on the right limit of Otter Creek, in the Otter Recording Precinct, Fourth Division, Territory of Alaska. (R. 2.) That petitioners ousted him therefrom and mined and extracted gold of the value of $45,000.00, to his damage in that amount. (R. 3.)

Respondent prevailed in the lower Court and on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed. (R. 454.)

Plaintiff's claim to title and right to possession of the Good Hope Claim is asserted under a placer mining location *attempted* to have been made by him on October 27, 1930. This location was made under the general mining l vs of the United States, as supplemented by the Alaska Legislature.

Defendants' contentions.

Defendants contend:

1. That defendant Sheppard ever since July 6, 1926, has been the owner of the "Blue Bird" and "North Star" placer mining claims by virtue of two placer mining locations, made by him on that date. (R. 6, 101-111.)

2. That in August, 1930, Sheppard leased the claims to the J. E. Riley Investment Company. (R. 6, 112.)

3. That the company immediately after the execution of the lease, entered into the actual possession of the claims and ever since has been in the actual possession thereof, as lessee, engaged in dredging thereon. (R. 6, 117, 118.)

4. That on October 27, 1930, plaintiff entered and trespassed upon the "Blue Bird" and "North Star" claims and attempted to locate a portion of each of them as the "Good Hoppe" claim. (R. 7, 8.)

5. That at the time plaintiff attempted to locate the "Good Hoppe", it was not unappropriated government land, open to location, but was the *property of Sheppard and in the actual possession of the defendant company as lessee. That plaintiff was a trespasser thereon.* (R. 7, 8.)

Plaintiff's contention as to Sheppard's title.

Plaintiff denied defendants' contentions, and in his reply (R. 8), alleged, that there were certain "flaws" in Sheppard's locations of the Blue Bird and North Star claims, that *rendered them invalid.*

These alleged "flaws" are that Sheppard, at the time of his location, failed:

First. (a) to mark the boundaries of his claims upon the ground so that they could be readily traced;

(b) that no discovery of gold was made by Sheppard *prior to the filing of his location certificates* with the Recorder of the Otter Precinct;

(c) that no location certificates, as required by law, were filed with the Recorder of said Precinct, and that the *pretended certificates of the Blue Bird and*

North Star filed in the Recorder's office did not contain the date of the discovery of gold or of the posting of the location notices; and,

(d) that neither the pretended *locations were tied to any natural object, permanent monument, or well-known mining claim.* (R. 9, 10.)

QUESTIONS SOUGHT TO BE REVIEWED BY THIS PETITION.

The questions sought to be reviewed by this petition are first: Is a certificate of location that describes a placer mining claim, as:

> "being from this initial stake 1320 feet down stream to post no. 2. thence 660 feet cross the creek to post no. 3. thence 1320 feet up stream to post no. 4. thence 660 feet back to this Initial Stake.
>
> "this claim is situated on the right limit of Otter creek a Tributary of Iditarod River Otter recording precinct fourth division Territory of Alaska. to be known 'Good Hoppe' claim." (R. 52),

sufficient to meet the requirements of Sec. 2324, Revised Statutes of the United States, which provides, that:

> "All records of mining claims * * * shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."?

The Circuit Court of Appeals has declared such a certificate sufficient, and, in so doing the Circuit Court

of Appeals *has abrogated and frittered away by construction the plain provisions of Sec. 2324, that, "are designed to secure a definite description—one so plain that the claim can be readily ascertained". (Hammer v. Garfield M. & M. Co.,* 130 U. S. 291.)

Second: May a subsequent locator intrude and trespass upon a placer mining claim in the actual possession of another, under claim and color of title, and make his wrongdoing successful, by asserting "flaws" in the title of the one against whom the wrong has been, by him, committed?

The Circuit Court of Appeals has upheld the trial Court, in refusing to submit this issue—although raised by the pleadings and supported by the evidence—as requested by the defendants. (R. 229, 230; Post, appendix p. i.)

VALIDITY OF PLAINTIFF'S LOCATION.

The validity of plaintiff's location is to be tested by the *General Mining Laws of the United States, as supplemented by the Alaska Legislature, in 1915,* as both plaintiff and defendants assert title, and right to possession, to their respective placer mining locations, under these laws.

General mining laws of the United States.

The General Mining Laws of the United States declare that:

> "All valuable mineral deposits in lands belonging to the United States * * * shall be free and

> open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R. S. Sec. 2319; Title 30, U. S. C. A. Sec. 28, p. 40.)"

Sec. 2324 provides that:

> "The location must be distinctly marked on the ground so that its boundaries can be readily traced. *All records of mining claims* made after May 10, 1872, *shall contain* the name or the names of the locators, the date of the location, and *such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.*" (Title 30, U. S. C. A., Sec. 28, p. 151.)

Under this law, in order to make a valid location, it is essential:

1. That the land be vacant, unappropriated public domain.

2. The locator must make a discovery of gold or other mineral within the limits of the claim.

3. The location must be distinctly marked upon the ground so that its boundaries can be readily traced; and,

4. *"All records of mining claims, when required by local rules or customs, shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."* (U. S. C. A., Title 30, Sec. 28, p. 151.)

ALASKA STATUTES RELATING TO CERTIFICATES OF LOCATION.

The provisions of the Alaska law as to the *contents of a certificate of location,* the recording thereof, and the *penalty for failure to comply,* are, as follows:

Certificate of location.

"Section 2. Within ninety days after the discovery and posting of the notice aforesaid, the locator shall record with the Recorder of the District wherein such claim is situated, a certificate of location. Such certificate shall contain:

a. The name or number of the claim.

b. The name of the locator or locators.

c. The date of discovery and of posting of the location notice.

d. The number of feet in length and width of claim.

e. It shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments.

A failure to record a certificate of location of claim as herein provided *shall operate as and be deemed abandonment thereof, and the ground so located shall be open to re-location;* provided, that if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator." (Italics ours.)

Failure to comply with provisions of act voids the location.

> "Section 9. That any placer mining claim located or attempted to be located in violation of any of the provisions of this Act, shall be null and void and revert to the public domain and may be located by any qualified locator as if no such prior attempt had been made."

In Alaska, therefore, the recording of a certificate of location *is an essential act of location and mandatory; and, failure of the certificate, to reasonably comply therewith, invalidates the location.*

Cloninger v. Finlaison (9 C. C. A.), 230 Fed. 98;
Vedin v. McConnell (9 C. C. A.), 22 Fed. (2d) 753;
Former Appeal (9 C. C. A.), 98 Fed. (2d) 8;
2 *Lindley on Mines* (3rd ed.), Sec. 384.

I.

PLAINTIFF'S LOCATION OF THE GOOD HOPE CLAIM VOID BECAUSE THE CERTIFICATE OF LOCATION FAILS TO MEET THE REQUIREMENTS OF SECTION 2324, REVISED STATUTES.

Plaintiff in order to show compliance with the law that requires a certificate of location to be recorded, introduced in evidence, over defendants' objections (R. 51), a so-called "Notice of Location" which (omitting filing marks) is in words and figures, as follows:

> "October 27, 1930. Notice of Location Notice here be given that I the undersigned hereby locate and Claim 20. (twenty) across of ground for placer mining purposes described as follow to

with being 'from this initial stake 1320 feet down stream to post no 2. thence 660 feet cross the creek to post no. 3. thence 1320 feet up stream to post no. 4. thence 660 feet back to this Initial Stake' this Claim is situated on right limit of Otter creek a Tributary of Iditarod River Otter recording precinst fourth division Territory of Alaska to be known Good Hoppe Claim Walter Sakow Locator Vitness Peter Miscovich Gold Discovered Oct. 27. 1930" (R. 52.)

The record shows uncontradicted, that Otter Creek is about 25 miles long. (Sakow's testimony, R. 64.)

It is obvious from a reading of this certificate, that it fails to describe the Good Hope claim with reference to *"some natural object, permanent monument* or well known mining claim" as will "identify the claim".

The only reference in the certificate to a natural object is that it is on the "right limit of Otter Creek" and the Circuit Court of Appeals held, in its first opinion (98 F. (2d) 8, 11), that this "does not identify it. Cloninger v. Finlaison, 9 Cir., 230 F. 98, 100."

The only other references in the certificate are to the "initial stake" by name; and, "post No. 2", "post No. 3", and "post No. 4", by numbers. The Circuit Court of Appeals, in its first opinion, held that these references to the stake and posts *did not describe a permanent monument.* The exact language of the Court being:

"We hold that, *otherwise than in the absence of a description of one of the stakes as a perma-*

> *nent monument,* which may be shown at the trial, the plaintiff's certificate of location is valid in form and content."

The Circuit Court of Appeals having determined that the *reference to Otter Creek did not "identify the claim"* and that there was *"an absence of a description of one of the stakes as a permanent monument"*, should have, then and there, declared the certificate void. But the Court did not do this. It said:

> "The 'stake' and 'posts' referred to in the claim may or may not be permanent monuments and it was for the jury to determine their permanency from the evidence produced."

In so doing the Court erred.

Under the provisions of Sec. 2324, *it is the recorded certificate* that must furnish the information as to where the location of the claim may be found upon the ground; and, the fact that a stake or post mentioned—but not described in the certificate—may in fact be a permanent monument *is immaterial,* if the *certificate itself* fails to make an intelligent reference, to a natural object or permanent monument, so that a person interested in finding the claim could do so, with reasonable certainty, by going to the natural object or permanent monument referred to in the notice.

That this construction is correct is evident from the plain language of Sec. 2324; the decisions of this Court; and, earlier decisions of the Circuit Court of Appeals for the Ninth Circuit, when called upon to construe Sec. 2324.

OBJECT AND PURPOSE OF SEC. 2324, REVISED STATUTES.

This Court in *Hammer v. Garfield Mining & Milling Co.,* 130 U. S. 291, 299, in speaking of the provision of Sec. 2324, which requires that all records of mining claims:

> "shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim",

said:

> "These provisions, as appear on their face, are designed to secure a *definite description—one so plain that the claim can be readily ascertained.* A reference to some natural object or permanent monument is named for that purpose."

The Circuit Court of Appeals for the Ninth Circuit, in *Cloninger v. Finlaison* (Alaska), 230 Fed. 98, 100, said, in speaking of a certificate of location, that,

> "a creek or a river without other description, will not answer for the natural object required by the statute, *so as to give the claim definite location,* and meet the requirements of Sec. 2324, Revised Statutes, which provides *that the monument or natural object must be such 'as will identify the claim'."*

The same Court in *Smith v. Cascaden* (Alaska), 148 Fed. 792, 794, laid down this *test,* as to the sufficiency of the recorded notice involved in that case, as follows:

> "The question then, is whether, in view of the *customary mode of describing mining claims in the Fairbanks district in Alaska, a person with the information which this recorded notice gives*

could find the location of this particular claim on the ground with reasonable certainty by going to the natural and permanent objects referred to in the notice. If he could, the notice is sufficient. North Noonday Mining Co. v. Orient Mining Co. (C. C.), 1 Fed. 522."

FLOATING OF CLAIMS ONE OF THE EVILS DESIGNED TO BE CORRECTED BY SEC. 2324.

One of the evils designed to be corrected by Sec. 2324, Revised Statutes, *was the floating of claims.* This was vividly pointed out by Judge Beatty, in *Gleeson v. Martin White M. Co.*, 13 Nev. 466. This case was decided, in 1878, four years after the Mineral Act, of 1872 was enacted. The opinion says:

"The record, if it consisted of a *mere copy of the (posted) notice,* would not *identify the claim* and there would be an opportunity as well as a temptation to the locators, *upon the discovery of a more valuable mine in the vicinity,* to prove by *perjured witnesses,* that their notice was posted on that mine. *The floating of claims was by no means an infrequent occurrence* prior to the act of 1872, and if such attempts were seldom completely successful, *they were always vexatious, and often the means of levying a heavy blackmail. It was on this account that the record* (not the notice) *was required to contain 'such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim'.* (R. S. 2324.)"

See also:

Brown v. Levan (Idaho), 46 Pac. 661, 664;
Darger v. Le Sieur (Utah), 30 Pac. 363, 365;
Drummond v. Long (Colo.), 13 Pac. 543, 544.

We ask, how any person from a reading of this certificate, and, with the information that it gives, could find the location of the Good Hope Claim with reasonable certainty? Where would a person go to look for the *stake or posts* referred to? Would *they* be near the mouth of the creek, center, near its source, or in between?

Again, there is nothing in the certificate, that would prevent plaintiff from floating his claim to any place on the right limit of Otter Creek, in order to covet his desires or to *cover a subsequently discovered pay-streak.* (R. 203, 204.)

Can the Court, from the description in the certificate give *"the claim a definite location"?* Can the Court say that there is *"a definite description—one so plain that the claim can be readily ascertained"?*

These questions are answered, by the language, of the District Court of Alaska, in *Fuller v. Harris,* 29 Fed. 814, 817, as follows:

> "There is neither a natural object, or permanent monument, or any designation or mark, by which the placer claim can be identified. *The idea that such a record complies with the law, or that it imparted any notice or information to the public is too absurd to require serious consideration.* The liberality extended by Congress to prospectors and miners was not *intended to entirely dispense with legal rules, or abrogate fundamental principles of law."*

The Circuit Court of Appeals, after holding, that the reference to the right "limit of Otter Creek" does not "identify the claim"; and, that the certificate does

not describe a "permanent monument"; nevertheless, leaves for the determination of the jury, the question whether the stake and posts referred to, by name and numbers, are in fact, "permanent monuments"; when, the *Court must know, as a fact, from "the testimony of their own senses"* that, even if they are permanent monuments that that fact cannot aid or cure the failure of the certificate to refer to some object as will identify the claim.

If the reference to the right limit of a creek 25 miles long does not "identify the claim", how can a reference to some stakes or posts—by name or number without further description—that have been established somewhere on the right limit of this creek make the certificate any more definite?

There is nothing in plaintiff's certificate that informs any one where the initial or other stakes are situated on the right limit of Otter Creek. There is *nothing* that gives *one seeking the locus of the claim even an inkling of something in the nature of an "initial point" from which to start.* And when it is considered that Otter Creek is 25 miles long and "zigzagged back and forth" (R. 90, Appellee's Plat, R. 81)—and was first staked in 1909 (R. 90), and, that the corners of the claims, since located, were established by stakes and posts driven in the ground—it is apparent that to find the stake and posts mentioned in the certificate would require an *endless search for, and an examination of, every stake on the right limit of Otter Creek, from its mouth to its source, until the stake or posts are found.*

Particularly is this so when it is considered that the certificate fails to describe the character of the stake or posts. That there is nothing to indicate whether they are two feet high, four feet high or six feet high or what their dimensions are otherwise; or whether they are plainly visible or not.

REASONS FOR GRANTING THE WRIT.

The Circuit Court of Appeals, in sustaining the validity of the certificate of location, has held (in the second opinion appendix p. v, R. 451) that a stake or post:

> "may be a permanent monument sufficient to satisfy the legal requirement as to identification, provided it is of a substance fairly permanent, is firmly planted in the ground and can be readily seen and identified by a person honestly seeking to find the claim" (Appendix p. v, post, R. 451)

and also that it was:

> "for the determination of the jury * * * whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument. * * * and the instructions given on the subject were correct." (Appendix p. v, post, R. 451.)

In so doing the Circuit Court of Appeals *has committed grave error.*

First. It has disregarded the fundamental rule *that the construction of all written instruments and their legal effect "belongs to the court".*

Second. It has decided an important question of Federal and local laws, of far reaching importance, to every mining community in the United States, where the general mining laws of the United States are in force:

A. Contrary to the plain provisions of Sec. 2324, Revised Statutes of the United States, which provides that:

> "*All records of mining claims hereafter* made shall contain the name or names of the locators, the date of location, and *such a description of the claim or claims located by reference to some natural object* or *permanent monument as will identify the claim.*"

B. Contrary to the plain provisions of subdivision e, Sec. 2, Ch. 10, Laws of Alaska 1915, page 12, that provides, that the location certificate:

> "shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments."
>
> "A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to relocation; * * *."

and, of Sec. 9, of said law, that provides:

> "That any placer mining claim located or attempted to be located in violation of any of the provisions of this Act, shall be null and void and revert to the public domain and may be located by any qualified locator as if no such prior attempt had been made."

C. Contrary to, and in conflict with, the decisions of this Court, in:

Hammer v. Garfield Milling & Mining Co., 130 U. S. 291;

McKinley Creek M. Co. v. Alaska Min. Co., 183 U. S. 563, 46 L. ed. 331;

Bennett v. Harkrader, 158 U. S. 441, 39 L. ed. 1046.

D. Contrary to, and in conflict with, its own decisions, and particularly, the following decisions, on appeal from Alaska.

Smith v. Cascaden, 148 Fed. 792;

Cloninger v. Finlaison, 230 Fed. 98;

Vedin v. McConnell, 22 F. (2d) 753.

E. Contrary to, and in conflict with, the decision of the United States Circuit Court of Appeals, Eighth Circuit, in *United States v. Sherman*, 288 Fed. 497, 499, where the Court said:

> "The descriptions given in the location certificate were not such as to identify the claim with reasonable certainty, which also rendered the location void. Erhardt v. Boaro, 113 U.S. 527, 28 L. Ed. 1113; Marshall v. Mining Co., 1 S.D. 350, 47 N. W. 290; Regan v. Whittaker, 14 S.D. 373, 85 N.W. 863."

F. Contrary to and in conflict with, the following Federal and State decisions:

Faxon v. Barnard (C. C. Colo.), 4 Fed. 702, 704;

Credo Mining Co. v. Highland M. & M. Co., 95 Fed. 911;

Bismark Mountain Mining Co. v. North Sunbeam Co., 14 Idaho 516, 95 Pac. 14;
Dillon v. Bayliss (Mont.), 27 Pac. 725, 726;
Darger v. LeSieur (Utah), 30 Pac. 363, 364;
Flavin v. Mattingly (Mont.), 19 Pac. 384;
Brown v. Levan (Idaho), 46 Pac. 661, 663;
Drummond v. Long (Colo.), 13 Pac. 543;
Clearwater etc. v. San Garde (Idaho), 61 Pac. 137, 138;
Brady v. Husby (Nev.), 33 Pac. 801, 803;
Gilpin Co. v. Drake (Colo.), 9 Pac. 787;
Baxter etc. v. Patterson (N. M.), 3 Pac. 741, 742;
Purdum v. Laddin (Mont.), 59 Pac. 153 (cited with approval in *Vedin v. McConnell,* supra);
Londonderry v. United Gold M. Co. (Colo.), 88 Pac. 455, 457.

IMPORTANCE OF THE QUESTIONS INVOLVED.

In determining the importance of the questions involved it is well to consider, the purpose of the statutes and local rules, that require certificates of location to be recorded, and prescribe their content.

It is a matter of mining history, that the first concerted acts of miners, in a new mining district, is to organize, by establishing a recording office and electing a recorder. No mining district of any importance ever existed, so far as we know, where such steps were not taken. The miners at the very outset provided means for definitely ascertaining the *locus* and extent of the

ground appropriated for mineral purposes, by requiring a definite description thereof; in order, that the *location of the claim could be readily determined and, in order to bar fictitious floating and fraudulent locations.*

ALASKA LAWS SUPPLEMENTAL TO THE GENERAL MINING LAWS OF THE UNITED STATES.

The Organic Act, creating a Legislative Assembly in Alaska and conferring legislative powers, was enacted by Congress, and approved, August 24, 1912. Prior to that time, there was no *Congressional law* requiring a certificate of location to be recorded. (*Sturtevant v. Vogel,* 9 Cir., 167 Fed. 448, 450.)

The first regular session of the Territorial Legislature convened March 3, 1913. One of the first laws enacted, by it was: "An Act to supplement the mining laws of the United States in their application to the Territory of Alaska * * *." (Ch. 74, Session Laws 1913, p. 283.)

This Act, *inter alia,* required certificates of locations of mining claims to be recorded and prescribed their content. The Act was substantially the same as the Act of 1915, by which, in conjunction with Sec. 2324, Revised Statutes, the validity of appellee's certificate of location must be tested.

The celerity with which the Alaska Legislature enacted this beneficial and remedial legislation—in its desire to guard against floating and fraudulent locations—demonstrates its great importance to the prospectors and miners of Alaska.

In *Butte City Water Co. v. Baker,* 196 U. S. 119, 128, this Court, in speaking, of the *importance of this character of legislation,* says:

> "It is contended that these provisions are too stringent, and conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims. We do not think that they are open to this objection. They certainly do not conflict with the letter of any Congressional statute; on the contrary, are rather suggested by Section 2324. *It may* well be that *the State Legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full particulars in respect to the discovery shaft and corner posts should be, at the very beginning placed of record. Even if there were no danger of false testimony, it was not unreasonable to guard against the resurrection of incomplete locations when, by subsequent explorations, mining claims of great value have been uncovered.*"

In *Faxon v. Banard,* 4 Fed. 702, 705, it is said:

> "The government gives its lands to those citizens who may discover precious metal ores therein, *upon condition that they will define the site of the ground with such certainty as may be necessary to prevent mistakes on the part of the government and on the part of other citizens who may ask a like bounty. This is reasonable and necessary to justly administer the law, and, therefore, it must be said that without such description, a certificate of location is void.*"

The importance of this character of legislation is also recognized, by the Circuit Court of Appeals, for the Ninth Circuit, in *Vedin v. McConnell,* supra, where the Court said:

> "For the reasons which have often been explained, the courts treat with great indulgence inaccuracies and uncertainties in initial notices and markings prescribed for mining locations. But the same considerations do not apply to the recorded certificate of location, where, as here, a liberal length of time is given in which to make such record; *and to uphold defendant's certificate, in the light of all the facts, would be to set at naught the substantial requirements of the law.* Without deciding that each of the defects would, in itself, be fatal, it is to be noted that the certificate fails to disclose the width of the claim, to give a description by reference to numbered stakes or monuments (Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153), to state the date of the discovery or posting of location notice, *or to tie the claim to any permanent monument or natural object, except by the vague and wholly inadequate reference to 'Cleary Creek' and 'Latanika'.*"

Mr. *Lindley,* in his work *on Mines* (3d ed.), Sec. 379, in speaking of the importance of "certificates of location", said:

> "By the term 'certificate of location', we mean the instrument prepared by the locator after the completion of the development work and the marking of his location, which certificate is required by the state laws or local rules to be

recorded. This instrument when recorded is a *statutory writing affecting realty, being, in the state or localities where it is required, the basis of the miner's 'right of exclusive possession' of his mining location granted by the laws of congress. It is the first muniment of his paper title,* upon the record of which proceedings for patent are based, and as recorded is intended to impart constructive notice to all subsequent locators of the existence of the claim, its precise locality and extent, as the marking of the location on the ground is intended to impart actual notice of these facts. The preliminary posted notice performs a temporary function; *the recorded certificate a more permanent one. This recorded certificate, notice, or declaratory statement, by whatever name it may be called, is the genesis of the locator's paper title."*

And in speaking of the *"Effect of failure to comply with the law as to contents of certificates"*, Mr. Lindley, in Sec. 384, says:

"It follows from what we have heretofore said that any *notice or certificate of location* which is used as the basis of the record which fails to reasonably comply with the *requirements of the federal law as to contents of such record is ineffectual and void."*

II.

THE CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT, IN ITS REFUSAL TO INSTRUCT THE JURY, AS REQUESTED BY THE DEFENDANT.

A. On the issue of actual possession under claim and color of title (R. 229); and,

B. That a mere intruder upon a claim in the actual possession of another cannot make his wrongdoing successful by asserting flaws in the title of the one against whom the wrong has been by him committed. (R. 230.)

(A) Error of the Court in refusing to instruct the jury as requested by defendants on the issue of actual possession under claim and color of title.

The amended answer alleges that when plaintiff attempted to locate the Good Hope claim on October 27, 1930, the ground included therein was not unappropriated government land, but was the property of Sheppard and was in the actual possession of the defendant company under a written lease. That the company was mining and dredging thereon, and that Sakow was a trespasser. (R. 7, 8.)

Defendants' evidence shows that the company took actual possession of the Bluebird and North Star claims immediately after the lease was executed on August 14, 1930. (R. 117.) That it did "a lot of work" * * * "several thousand dollars worth" of work upon them in 1930. That the work consisted of clearing brush, laying pipe lines, digging ditches, and thawing frozen gravels preparatory to "dredging operations". (R. 117, 118.) This testimony is uncontradicted.

The defendants contended at the trial that the acts of Sheppard in locating the Bluebird and North Star claims by: (1) making discoveries of gold (R. 106); (2) marking the boundaries of the claims upon the ground so that they could be readily traced (R. 101-106); (3) posting location notices upon the initial stakes (R. 106, 107); (4) recording location certificates (R. 107-111); (5) performing the annual labor required by law for assessment years 1927-1928, 1928-1929, 1929-1930, 1930-1931, and filing affidavits of labor in proof thereof (R. 114-119, 172); and (6) *the fact that the Investment Company was in the actual physical occupancy of the ground under a written lease, engaged in clearing brush and thawing frozen ground preparatory to dredging operations* (Affidavit of Labor (R. 118), constituted actual possession of the Bluebird and North Star claims under claim and color of right and title, and that by reason thereof the ground which plaintiff attempted to locate on October 27, 1930, was not vacant, unoccupied land of the United States, open to location, for mining purposes.

In order that this issue might be clearly presented to the jury, the defendants requested the Court to instruct them, as follows (R. 229):

> "You are instructed that if you believe that the defendant Sheppard, on July 6, 1926, (1) made a discovery of gold within the boundaries of the Blue Bird and North Star claims, (2) marked the boundaries upon the ground so that they could be readily traced and erected the necessary posts as I have hereinbefore instructed you,

and posted notices of location on each of said claims, and within ninety days after the discovery of gold and the posting of the location notices, caused to be recorded in the office of the Recorder of the Otter Precinct, certificates of location as required by law and, (3) thereafter performed the annual labor required by law, and that on August 14, 1930, the said Sheppard leased said mining claims to the J. E. Riley Investment Company and that the said J. E. Riley Investment Company, as lessee, thereupon entered upon the actual possession of said claims and began work thereon for the purposes of preparing said ground for dredging, and that said work was carried on by the said J. E. Riley Investment Company until the end of the mining season of 1930, then I instruct you that said acts of said Sheppard and of said lessee constituted an actual occupation and possession of said mining claim by the J. E. Riley Investment Company, and that the ground included within the boundaries of said North Star and Blue Bird claims would not be open to location by the plaintiff or any other person for the reason that said claims were in the actual possession of others under claim and color of right, and were not, therefore, vacant and unoccupied ground of the United States subject to location." (R. 229.)

This instruction the trial Court refused to give (R. 229), nor, was there any instruction given, *covering this issue.* (R. 235-254.)

B. The defendants also requested the Court to instruct the jury, as follows:

> "That a mere intruder and trespasser upon a claim in the actual possession of another cannot make his wrongdoing successful by asserting a flaw in the title of one against whom the wrong has been by him committed." (R. 230.)

This instruction the trial Court also refused to give (R. 230), nor, was any instruction given by the Court covering this issue. (R. 235-254.)

The only allusion, by the Circuit Court of Appeals to this vital question, is the statement "Other errors were assigned but we find none warranting a reversal". (Post, appendix p. vi, R. 452.)

REASONS FOR GRANTING A WRIT OF CERTIORARI TO REVIEW THIS QUESTION.

The Circuit Court of Appeals, in affirming the action of the trial Court, in refusing to instruct the jury on one of the most vital issues presented by the pleadings and evidence, has decided an important question of Federal and Territorial law:

A. Contrary to, and in conflict with, the applicable decisions of this court in the following cases:

Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 73;
Hawes v. Victoria Copper Min. Co., 160 U. S. 303, 40 L. ed. 436;
Clipper Min. Co. v. Ely Min. Co., 194 U. S. 220, 231, 48 L. ed. 944.

B. Contrary to, and in conflict with, *its own decisions, and particularly, those in appeals from Alaska, in the following cases:*

McIntosh v. Price, 121 Fed. 716, 718;
Rooney v. Barnette, 200 Fed. 700, 705.

C. The Circuit Court of Appeals has sanctioned a departure from the usual course of judicial procedure, by allowing an intruder and trespasser on mining claims in the actual possession of another, to make his wrongdoing successful by asserting flaws in the titles of the persons whom he has wronged.

In *McIntosh v. Price,* 121 Fed. 718, the Circuit Court of Appeal, said:

> "The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim one *who has located a placer claim in an attempted compliance with the mining rules and laws,* and who is actually engaged in mining upon that portion of his claim. A case directly decisive of the question is Haws v. Victoria Copper Mining Company, 160 U. S. 303, 16 Sup. Ct. 282, 40 L. ed. 436. In that case the Victoria Mining Company was in possession of land and was engaged in working a certain mining claim. One of its employes discovering what he conceived to be fatal defects in the location notices of the claims, conceived the secret intention of taking possession of the property for his own benefit, secured the assistance of another, and made locations on the ground then occupied by his employer, set stakes and posts with notices, and in the night time ousted the mining company from its possession. The court held that such an intruder and trespasser could not make his wrongdoing successful by asserting a flaw in the title of him against whom the wrong had been

committed. In Eilers v. Boatman and others, 111 U. S. 357, 4 Sup. Ct. 432, 28 L. ed. 454, the Supreme Court, affirming the decision of the Territorial Court of Utah in Eilers v. Boatman, 3 Utah 167, 2 Pac. 66, *held that one cannot locate ground on which another is in the actual possession under claim and color of right, because such ground is not vacant and unoccupied.*" (Italics ours.)

Said the Circuit Court of Appeals in *Rooney v. Barnette* (Alaska), 200 Fed. 700, 705:

> "*The present action is a suit in ejectment.* It is elementary law that a plaintiff in ejectment must recover upon the strength of his own title, which must be sufficiently established to warrant a verdict in his favor. *A mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of one against whom the wrong has been by him committed.*" (Italics ours.)

These decisions are most pertinent to the facts of this case.

Wherefore, your petitioners pray, that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and to mail to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of all proceedings in this case, numbered on the docket of said Court, No. 9237; that judgment therein be reversed by this Honorable Court; and

that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
June 3, 1940.

J. JOSEPH SULLIVAN,
Attorney for Petitioners.

JULIEN A. HURLEY,
CHARLES E. TAYLOR,
JOHN L. MCGINN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am attorney for the petitioners in the above entitled case, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
June 3, 1940.

J. JOSEPH SULLIVAN,
Attorney for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1939

No.

J. E. RILEY INVESTMENT COMPANY (a corporation), HARRY P. SHEPPARD and HARRY DONNELLEY,
Petitioners,

vs.

WALTER SAKOW,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We apprehend that it will be needless to repeat the statement of the case made in the foregoing petition. In this brief we will recapitulate the points made and urge consideration of the same.

PETITIONERS' CONTENTION AS TO RESPONDENT'S LOCATION CERTIFICATE.

Petitioners contend:

First. That Sakow's certificate of location is void on its face and cannot be aided by evidence *aliunde*. That it was the duty of the Court to declare it void as a matter of law.

Second. That the reference in the certificate to the initial "stake" and "posts" of the Good Hope, by name and number, without further description, is not a reference to a *permanent monument as will identify the claim, within the plain meaning of Sec. 2324,* Revised Statutes. That it was the duty of the Court to so declare as a matter of law.

Third. That even if the certificate of location had described the initial stake and post No. 2, as described in the opinion of the Circuit Court of Appeals, namely, as, each being about six by eight inches from top to bottom and blazed on four sides; four or five feet in height above the surface; firmly embedded in the ground; and, plainly visible from the valley of the creek; that this additional description would not convert the initial stake and post No. 2 into permanent monuments *as would identify the claim,* nor aid in directing anyone interested in finding the situs of the claim on the ground.

Fourth. That appellee's own testimony[1] conclusively shows that the stakes were not perma-

1. Testimony of Walter Sakow (R. 203, 204):

"Q. Will you tell this jury, Mr. Sakow, what would prevent you, or anybody else, from just picking one of these stakes and moving it anywhere you wanted to on that property? You could move this stake that was on this property to any part of the right limit of Otter creek that you wanted to?

A. That stake anybody could move as they want to.

Q. You could move this stake without any trouble?

A. Yes.

Q. You didn't tell, in your location notice, where this property was located with reference to any other claim down there, did you?

A. No, everybody in town know where my claim was located.

Q. You didn't say anything in your notice about where it was, did you?

A. No.

Q. How did you expect anybody to find your claim?

A. I don't know why anybody would want to find my claim."

nent monuments, because, as testified by him, they could be moved by anyone, without trouble, to any place on the right limit of Otter Creek. (R. 203, 204.)

Fifth. That for the Court to allow the jury to determine, in the light of the testimony and facts of this case, that stakes or posts which are not tied to any natural object, permanent monument or well known mining claim—and which can be moved without trouble by any one, to any place on the right limit of Otter Creek, are *permanent monuments as will identify the claim,* so that it can be "definitely located" and "readily ascertained", is an *abdication* by the Court of its duty. That to do so is to enthrone fiction for truth and allows a jury to declare *as a fact* that which the Court from "the testimony of their own senses" and the very nature of the thing itself proclaims is not a fact. It allows a jury to determine property rights contrary to *self evident physical facts and contrary to the truth.*

SECOND OPINION CIRCUIT COURT OF APPEALS AS TO SUFFICIENCY OF LOCATION CERTIFICATE.

The Circuit Court of Appeals in passing on the sufficiency of plaintiff's certificate of location, in its second opinion said:

> "There was a motion for a directed verdict in favor of all the defendants, bottomed on the asserted invalidity of the certificate of location of the Good Hope. The denial of this motion is

assigned as error. The argument in this respect is that the certificate failed to describe the claim with reference to some natural object or permanent monument, as required by the territorial statute. Ch. 10, Session Laws Alaska 1915.

The case was heretofore before this court on an appeal from an earlier judgment, 9 F.(2d) 8. The certificate is set out verbatim in our opinion on that appeal. The claim is described as being situate on the right limit of Otter Creek, a tributary of the Iditarod River, Otter Recording Precinct. This as the evidence shows is a featureless locality. There was testimony that the initial stake of the Good Hope measured about six by eight inches from top to bottom and had been blazed on four sides. It was four or five feet in height above the surface and was firmly embedded in the ground, so firmly that it had remained in place from the inception of the location to the time of trial in 1938. The same is true of post No. 2. Both posts were plainly visible from the valley of the creek and each bore appropriate markings.

The jury were instructed that a post or stake may be a permanent monument sufficient to satisfy the legal requirement as to identification, provided it is of a substance fairly permanent, is firmly planted in the ground, and can be readily seen and identified by a person honestly seeking to find the claim. The court left for the determination of the jury the question whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument. This was proper, and the instructions given on the subject were correct. Hammer v. Garfield M. & M. Co., 130 U. S. 291; Bismark

Mountain Mining Co. v. North Sunbeam Co., 14 Idaho 516, 95 P. 14; Credo Mining Co. v. Highland M. & M. Co., 95 Fed. 911; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 666."

These authorities, cited by the Court, in support of its holding, that the trial "*court properly left for the determination of the jury, the question whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument.*", does not support this doctrine. These cases are hereinafter considered by us on pages 46-50.

DEFENDANTS' OBJECTIONS TO LOCATION CERTIFICATE.

The validity of plaintiff's certificate of location was challenged by defendants, in the trial Court:

First. By objecting to its introduction in evidence, upon the grounds:

(1) That this notice fails to identify the claim with reference to some natural object, permanent monument, or well-known mining claim, so that it can be readily identified.

(2) That no person, from an inspection of this certificate of location, could determine with reasonable certainty the location of the claim.

(3) That the only description in this notice is that the claim is situate on the right limit of Otter Creek, and that that is not a natural object or permanent monument of itself sufficient to identify the claim.

(4) That the statutes of Alaska, in addition to the requirement that the certificate of location shall identify the claim with reference to some natural object, permanent monument, or well known mining claim, also requires a description of the post, or stakes, upon the ground, by reference to their numbers; and, that the numbering of the stakes, or posts, does not constitute a natural object or permanent monument. (R. 51, 52.)

Second. By moving for a directed verdict in favor of all of the defendants upon the ground, that, the certificate of location failed to describe the property with reference to some natural object or permanent monument or well known mining claim, as required by law; and, that when a record of a location of a mining claim is required by local law, that then the record is an essential part of the location, and is mandatory; and, that the failure to meet the requirements of the law in this respect is tantamount to a failure to record. (R. 225, 226.)

The objections to the introduction of the certificate in evidence presented a legal question that must be determined from an inspection of the certificate itself, unaided by oral testimony or extrinsic fact.

It is the universal rule that "the construction of all written instruments belongs to the court".

4 *Wigmore on Evidence,* Sec. 2556.

The Circuit Court of Appeals recognized this rule, when on the first appeal, it declared as a matter of

law, that the reference in the certificate to the right limit of Otter Creek "does not identify it"; and, also, when it declared that there was an *"absence of a description of one of the stakes as a permanent monument"*. The Court having declared that the *natural object mentioned in the certificate, namely, Otter Creek, did not identify the claim;* and, that there was an *absence of a description of a permanent monument* should have declared, then and there, the certificate void.

It is well established that where the insufficiency of the location certificate in its failure to make an intelligent reference to natural objects or permanent monuments, *is apparent on its face, that it is void and must be rejected.*

In *Dillon v. Bayliss* (Mont.), 27 Pac. 725, 726, the Court says:

> "Now, what are the facts as to the location notice in question? We examine it now upon its face alone, to ascertain whether it should, prima facie, be admitted in evidence, wholly disregarding, for the present, all uncertainties and ambiguities that may be developed by evidence aliunde the notice."

In *Darger v. LeSieur* (Utah), 30 Pac. 363, 364, the Court says:

> "We think the court erred in admitting in evidence plaintiffs' location notices. They are fatally defective, and valid locations cannot be made under them."

In *Flavin v. Mattingly* (Mont.), 19 Pac. 384, the Court on page 385 says:

> "The objection evidently went to the effect, instead of the admissibility, of the evidence. If there was no description contained in the notice, or attempt to describe the locality or vicinity of the mining claim by reference to some natural object or permanent monument, it might have been excluded by the court. But, where the description contained in the notice is merely defective, it should be left to the jury with other evidence in the case."

See, also:

Brown v. Levan (Idaho), 46 Pac. 661, 663;
Faxon v. Banard, 4 Fed. 702;
Drummond v. Long (Colo.), 13 Pac. 543;
Clearwater etc. v. San Garde (Idaho), 61 Pac. 137, 138;
Brady v. Husby (Nev.), 33 Pac. 801, 803;
Gilpin Co. v. Drake (Colo.), 9 Pac. 787;
Baxter etc. v. Patterson (N. M.), 3 Pac. 741, 742;
Purdum v. Laddin (Mont.), 59 Pac. 153 (cited with approval in *Vedin v. McConnell*, supra);
Londonderry v. United Gold M. Co. (Colo.), 88 Pac. 455, 457;
Cloninger v. Finlaison, 230 Fed. 98;
Vedin v. McConnell, 22 F. (2d) 753.

POSTS OR STAKES AS PERMANENT MONUMENTS.

Defendants contended at the trial that the principal characteristic of "permanent monuments" are their *"stability and permanency"*. That they must be fixed and durable—not "unstable and ephemeral". That they must be suitable as "land-marks". That one of the ends designed to be corrected by Sec. 2324, was to the "floating or shifting" of claims. In order that this purpose should be called to the attention of the jury, defendants requested the Court to instruct them, as follows:

> "I instruct you that the posts or stakes claimed by plaintiff to have been established by him at the time of his location on October 27, 1930, are not permanent monuments within the meaning of the law, for the reason that said posts or stakes were not tied to any object and could be shifted to any place on the right limit of Otter Creek to suit the convenience of the plaintiff or to cover any subsequent pay streak that might be uncovered." (R. 227, 228.)

It must be borne in mind that:

> "The words 'natural objects' and 'permanent monuments' are general terms, susceptible of different shades of meaning, depending largely upon their application. What might be regarded as a permanent monument for one purpose might not be so considered with reference to a different purpose. * * * There is no particular necessity for drawing a distinction between 'natural objects' * * * and 'permanent monuments' which may imply an element of artificial construction, it *being the manifest intent* of the law that any *object of*

a fairly permanent character, whether natural or artificial, *may, if sufficiently prominent,* serve for the purpose of reference and identification."

2 *Lindley on Mines* (3rd Ed.), Sec. 383.

It is evident, therefore, that posts or stakes of sufficient size and firmly planted in the ground, with proper markings, may be deemed permanent monuments for the purpose of marking the boundaries of the claim upon the ground so that they can be readily traced as required by Sec. 2324; and, that the same stakes or posts, *unless they are tied definitely to some natural object or permanent monument,* would not meet the requirements of the section as to identifying the claim.

Even if we concede, *arguendo,* that the stake and posts mentioned in Sakow's certificate are permanent monuments, they do not "give the claim definite location", and meet the requirements of Sec. 2324, Revised Statutes, which provides that the monument or natural object must be such 'as will identify the claim' ". As was said in *Quimby v. Boyd* (Colo.), 6 Pac. 462, 467:

"What might be regarded as a permanent monument for one purpose, might not be so considered with reference to a different purpose. So of natural objects. They abound everywhere, but their characteristics vary greatly, some being *unstable and ephemeral,* others *fixed and durable;* and since only those possessing the *latter qualities are suitable for landmarks,* it is evident that such only were intended by the terms employed in the section referred to."

FEDERAL DECISIONS CONSTRUING SEC. 2324, R. S.

For the convenience of the Court, we have quoted from the leading decisions of the Federal Courts, construing Sec. 2324, Revised Statutes. These cases will be found on pages 50-56, post. We have also set out, in some of the cases, the location certificates involved.

STATE DECISIONS CONSTRUING SEC. 2324, R. S., AND STATUTES SIMILAR TO THE ALASKA STATUTES.

We have likewise, post pp. 57-61, quoted from state cases, construing Sec. 2324, R. S., and statutes similar to the Alaska Statutes. In some of the cases we have also set out the location certificates involved.

FLOATING OF CLAIMS.

In order, that the jury might have a comprehensive understanding of the purpose of the certificate of location, and, as a challenge to the sufficiency of plaintiff's certificate, defendants requested the Court to instruct the jury, as follows:

> You are instructed that the purpose of the law, in requiring a certificate of location to describe the claim with reference to some natural object, permanent monument or well-known mining claim, is three-fold.
>
> First. To secure a definite description—one so plain that the claim can be readily ascertained. Second. To prevent the floating of the claim almost anywhere to suit the wishes of the locator

or to cover a pay streak that may be subsequently discovered.

Third. To enable a person looking for mineral deposits to find the natural object or permanent monument or well known mining claim described in the notice and, from the descriptions of the stakes or posts contained in the notice, trace the boundaries of the claim. (R. 225, 226.)

This instruction the Court refused to give.

The plaintiff had testified that the stakes established by him at the time of his location on October 27, 1930, could be moved by anyone without trouble to any place on the right limit of Otter Creek. (R. 204.) But without plaintiff's testimony this is a self evident fact.

For the purpose of showing how the Courts of the western mining states treat certificates of location that permit the claim to be "floated and swung" most anywhere to suit the wishes of the locator, we quote, from the following cases:

In *Brown v. Levan* (Idaho), 46 Pac. pages 661, 664, the Court says:

> *"The discovery stake might have been moved many times, and no one unacquainted with the location could have discovered from the location notice that it had been so moved.* We think it the duty of the court to give mining notices and records a liberal construction, to the end of upholding a location made in good faith. But where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the

claim from the location notice, as is evident in this case, and where it is such that the claim may be floated almost anywhere to suit the ground or to cover ore that may have since been discovered, *it is clearly such a notice as cannot furnish a foundation for a valid location.*"

In *Darger v. LeSieur* (Utah), 30 Pac. 363, the Court said in speaking of a location certificate on page 365:

"* * * it will readily be seen how they could be swung around so as to cover any piece of ground sought to be taken by anyone else within a radius of several miles. We think the descriptions in the locations are not such as is required by the statute. Drummond v. Long, 13 Pac. 543; Faxon v. Banard, 4 Fed. 702; Mining Co. v. Drake (Colo.), 9 Pac. 787."

In *Drummond v. Long* (Colo.), 13 Pac. 543, the Court says at the bottom of page 544:

"Mining litigation under the Act of Congress discloses frequent attempts to secure a patent for mining territory other than the territory originally located, in fraud of the government and in fraud of the rights of neighboring locators. The foregoing are some of the considerations upon the statutory requirement we are considering are based.

The intention of the provision is to give one seeking the locus of a recorded claim something in the nature of an initial point from which to start, and following the course or distance given, find with reasonable certainty the claim located. The identification must be by reference to some natural object or permanent monument."

In *Mutchmor v. McCarty* (Cal.), 87 Pac. 85, the Supreme Court of California said (syllabus):

> "Where a notice of location of a lode claim failed to contain a description of the claim by reference to a natural object or permanent monument by which it could be identified, as required by Rev. St. U. S. Sec. 2324, it was ineffective for any purpose."

NATURAL OBJECTS AND PERMANENT MONUMENTS OF OTTER CREEK.

The Circuit Court of Appeals, in its opinion, says that the evidence shows that the right limit of Otter Creek "is a featureless locality". This statement can only refer to that portion of Otter Creek, that lies between Flat Creek, on the west, to Discovery Claim on Otter Creek, on the east, as, this is the only part of Otter Creek referred to in the record. Flat Creek flows into Otter Creek at the town of Flat and is about a mile and a half (at its conjunction with Otter Creek) from the Good Hope claim. (R. 21, 90.) This is a natural object to which Sakow could have tied the Good Hope claim. The distance from Flat to Discovery Claim, Otter Creek (where there is also a small town) (R. 98) is about two and one-half miles. (R. 90.) Sakow could have tied the Good Hope to Discovery claim which is the customary mode of tying mining claims in Alaska. (*Smith v. Casaden,* 148 Fed. 794.) The Good Hope claim is situated between Flat and Discovery—about a mile west of Discovery. Between the town and Flat and the Good Hope claim is the Government Bridge. Cotten, appellee's surveyor,

tied his survey of the Good Hope claim to the bridge. (R. 22.) This bridge according to Sakow's plat (R. 81), is a little less than a half mile in a westerly direction from the Good Hope. Sakow could have tied his claim to the bridge, in his certificate of location. The record also shows that a Government Road (running east and west toward the town of Flat), was about 600 feet north of the North Star Association (R. 99) and Sakow could have tied his claim to this road. Furthermore the record, undisputed, shows, that in 1914, a survey was made of the K. P. M. Association and that at that time the north line of the K. P. M. Association was cut and brushed out its full length, to a width of from seven to ten feet. That this north line was used as a winter and summer trail between the town of Flat and Discovery, Otter Creek. (Appellants' Opening Brief, p. 58.) The record also shows that there were other well known claims, in close proximity, namely the Last Chance, Reindeer, and Creek Claim No. 3, below Discovery on Otter Creek. (R. 90, 98.) Sakow could have tied his claim to any of these and also to the trail along the north line of the K. P. M. Association. Appellee's plat also shows that the Government bridge is tied to Pyramid Peak. (R. 81.)

AUTHORITIES CITED BY COURT DO NOT SUPPORT HOLDING.

The authorities, cited by the Circuit Court of Appeals, in support of its holding, that the trial Court properly left for the determination of the jury, the question whether any of the stakes mentioned in the

location certificate of the Good Hope constituted a permanent monument, do not support such a doctrine.

The cases cited are *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291; *Bismark Mountain Mining Co. v. North Sunbeam Co.*, 14 Idaho 516, 95 P. 14; *Credo Mining Co. v. Highland M. & M. Co.*, 95 Fed. 911; *Jupiter M. Co. v. Bodie Cons. M. Co.*, 11 Fed. 666. We will proceed to consider these cases in their order.

Hammer v. Garfield.

In the case of *Hammer v. Garfield*, the claim was identified as being "located about fifteen hundred feet south of Vaughan's Little Jennie Mine" and described as being situated in the Vaughan mining district, Lewis and Clarke County, Montana, and described by metes and bounds with reference to stakes.

The Court in speaking of the notice said:

> "Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification. Such stakes were placed here with a description of the premises by metes; *and to comply with the requirements of the statute, as far as possible,* the location of the lode is also indicated by stating its distance south of 'Vaughan's Little Jennie Mine', *probably the best known and most easily defined object in the vicinity.* We agree with the court below that the Little Jennie Mine will be presumed to be a well known natural object or permanent monument until the contrary appears, where a location is described as in this

notice and is further described 'as being 1500 feet south from a well known quartz location, and there is nothing in the evidence to contradict such a description, distance, and direction'."

Here we find a definite direction to the locus of the claim.

It is clear that the Court did not hold that a reference to stakes or posts, alone, in the certificate, constituted a reference to a permanent monument as would identify the claim. On the contrary, it laid down the rule, that, in the absence of evidence to the contrary, a reference, in the notice to a mining claim, will be presumed to be a well known natural object or permanent monument until the contrary appears. The Court then says, in substance, that stakes driven into the ground to mark the boundaries of the claim and which are described as being 1500 feet south of a well known quartz claim is a sufficient *description* in the absence of evidence to contradict it.

Credo M. & S. Co. v. Highland, supra.

In this case there was a conflict between two quartz mining locations. One of the claims was known as: "The Comstock Claim", situated in the Chewelah Mining District, Stevens County, State of Washington. The notice of location is set forth in the opinion. It describes the claim with reference to posts by metes and bounds and designates the stakes by reference to the points of the compass. After so doing, it then says:

"This claim is further described as follows: About one mile southwesterly from the Marshall

Lake and two and one-half miles northerly from Pend d O'Rielle river. Posts are placed at the corner and both ends of center lines. This notice is placed at discovery."

Judge Hanford in passing upon this notice said:

"It is quite plain from the reading of the notice itself that the locators of the Comstock claim intended to meet fully every requirement of the law. The notice which they caused to be recorded described the claim by reference to posts at each of the four corners, and at the centers of both end lines, and, for the purposes of indicating the approximate situation of the claim, the notice also refers *to a lake and a river, giving approximately the distances and directions therefrom to the claim.* There is testimony disputing the accuracy of the distances and directions mentioned, and I have no doubt that, *if there were no other description of the claim in the recorded notice than the reference therein to the lake and river, it would be impossible to identify the claim by such a reference; but, on the other hand, the evidence convinces me that an intelligent person, having no other guide than the description of the claim contained in the recorded notice, would be aided by the reference to the lake and river in finding the vicinity of the claim, and when there would be able to readily find the claim and identify it by the posts referred to in the notice. By this test the recorded notice appears to me to be sufficient.*"

The Court further says:

"I find from the evidence that the post by which the lines of the claim were marked are

> from five to seven inches in diameter, and were all firmly planted in the ground, and stood not less than five feet above the ground, and I hold that they are permanent monuments, within the definition of the phrase 'permanent monuments' in this statute."

This authority strongly supports our position that the description of the claim in the certificate must be the sole test of its sufficiency. That where, as in this case, there are references to natural objects, and a description of the claim by metes and bounds according to the stakes on the ground, that then the question whether such description in reality ties the claim to a natural object or permanent monument is one of fact. But, where the certificate neither describes the claim with reference to a natural object or permanent monument, that, then no question of fact can arise.

Bismark Mountain Co. v. North Sun Beam Co.

In *Bismark Mountain Co. v. North Sunbeam Co.*, 95 Pac. 14, the certificates after describing the claim as 1500 feet in length by 660 feet in width and giving a description by metes and bounds according to the corner stakes which are designated according to the compass, then says, that the claims are situated on "Bismark Mountain". The evidence at the trial disclosed that *"Bismark Mountain" is a small mountain; that it could be covered by ten or twelve mining claims" and "that it was a well known object around there in the Yankee Fork District; and that it is known among prospectors there everywhere".*

The Court in this case held, that:

> "* * * the object of requiring a reference to a natural object or permanent monument is to furnish means by which to identify the claim, and whatever reference will accomplish this object satisfies the law."

The Court held that under the facts of the case that "Bismark Mountain" was a "natural object" and that it was sufficient to identify the claim.

The Court also quoted with approval the following language from *Flavin v. Mattingly* (Mont.), 19 Pac. 384:

> "The object of the law, in requiring the location to be made in reference to some natural object or permanent monument, is not very apparent, unless it was for the main purpose of directing attention in a general way to the vicinity or locality in which the location was to be found."

Jupiter v. Bodie.

Jupiter Mining Company v. Bodie Cons., M. Co., 11 Fed. 679, simply holds that: "permanent monuments may consist of a prominent post or stake firmly planted in the ground".

FEDERAL CASES CONSTRUING SEC. 2324, REVISED STATUTES.

The Supreme Court of the United States in *Hammer v. Garfield Mining & Milling Co.,* 130 U. S. 291, 299, in speaking of the provision of Sec. 2324 of the Revised Statutes which provides that all records of mining claims

> "shall contain the name or names of the locator, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim".

said:

> "These provisions, as appear on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose."

This Court in *Smith v. Cascaden,* 148 Fed. 792, quoted with approval, on page 793, the above quoted language of the Supreme Court in *Hammer v. Garfield etc.* This Court, in the same opinion, also set forth as a test to the sufficiency of the recorded notice involved in that case, as follows:

> "The question then, is whether, in view of the customary mode of describing mining claims in the Fairbanks district in Alaska, a person with the information which this recorded notice gives could find the location of this particular claim on the ground with reasonable certainty by going to the natural and permanent objects referred to in the notice. If he could, the notice is sufficient. North Noonday Mining Co. v. Orient Mining Co. (C. C.), 1 Fed. 522."

In *Cloninger v. Finlaison,* 230 Fed. 98, the Court in passing upon the sufficiency of a certificate of location under the Alaska Act, 1913 (which for the purposes of this case may be considered the same as the 1915 Act) said:

"The plaintiff's certificate declared that the name of the claim is 'No. 1, Bear Creek placer mining claim', that it is situated in the White River mining district, territory of Alaska, and that 'Bear Creek is a tributary of Big Eldorado'."

One of the objections to the certificate was that it did not set forth a description of the claim with reference to "some natural object, permanent monument or well known mining claim", as required by Alaska laws 1913, c. 74, Sec. 10.

The Court in commenting upon this notice said:

"* * * in the case at bar the description refers to no natural object, or permanent monument, or well known mining claim. The name 'claim No. 1, Bear Creek placer mining claim' does not necessarily mean that the claim is located on Bear creek, and if the claim had been described as located on that creek, the notice would still be insufficient to comply with the statute, for a creek or a river, without other description, will not answer for the natural object required by the statute, *so as to give the claim definite location,* and meet the requirements of Section 2324, Revised Statutes (Comp. St. 1913, Sec. 4620), which provides that the monument or natural object must be such 'as will identify the claim'.

In McKinley Mining Co. v. Alaska Mining Co., 183 U. S. 563, 46 L. Ed. 331, the claims were described as located on McKinley creek, and at a stated distance from the first falls on the creek. The court said:

'These notices constituted a sufficient location. The creek was identified, and between it

and the stump there was a definite relation, which, combined with measurements, enabled the boundaries of the claim to be readily traced.'

But in the present case the claim has no definite relation to the creek, and the mere mention of Bear creek serves in no way to identify the claim. Faxon v. Barnard (C. C.), 4 Fed. 702."

In *Vedin v. McConnell,* 22 F. (2d) 753, the certificate of location under consideration was as follows:

"Chatanika, Alaska, July 1, 1921.

I have this day relocated the twenty acres of placer ground known in original records as the Anderson claim. Bounded on the west by the McFarland fraction, on the south by the Diamond fraction and McKnutt, on east by Serpentine, on north by the Duncan and 17 creek.

The ground runs 1,320 feet up and down Latanika and across Cleary creek about three hundred on west end. Ground lies in the Fairbanks Mining and Recording Precinct.

Claim 16 below Cleary.

Oliver A. McConnell.

Witness: Morris O'Leary.

Filed for record July 16, 1921, at 15 min. past 11 a.m.

Reed W. Heilig, Recorder."

In declaring this certificate of location void the Court said:

"For the reasons which have often been explained, the courts treat with great indulgence inaccuracies and uncertainties in initial notices and markings prescribed for mining locations.

But the same considerations do not apply to the recorded certificate of location, where, as here, a liberal length of time is given in which to make such record; *and to uphold defendant's certificate, in the light of all the facts, would be to set at naught the substantial requirements of the law.* Without deciding that each of the defects would, in itself, be fatal, it is to be noted that the certificate fails to disclose the width of the claim, to give a description by reference to numbered stakes or monuments (Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153), to state the date of the discovery or posting of location notice, *or to tie the claim to any permanent monument or natural object, except by the vague and wholly inadequate reference to 'Cleary Creek' and 'Latanika'.*"

In the case of the *United States v. Sherman,* 288 Fed. 297, the United States Circuit Court of Appeals for the Eighth Circuit, in construing the legal effect to location certificates involving two mining locations known as "Oaxaca" and "Helamonster", at page 501 said:

> "There is another fact showing that appellee never made a good and valid location. R.S.U.S. Sec. 2324, has this additional requirement:
>
> 'All records of mining claims hereinafter made shall contain the name or names of the locator, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.'
>
> In furtherance of this the South Dakota statutes (Rev. Code 1919, Secs. 8728, 8729) requires

the filing of a location certificate with the register of deeds of the county * * * and says that if the description in it is not such as shall identify the claim with reasonable certainty it shall be void. The location certificate filed by appellee for the Oaxaca lode, after stating that it is in Pactola mining district, Pennington County, described it thus:

> 'Said claim is located about one mile west of Pactola and north of Rapid creek in Boarding House Gulch and is about 1500 feet east of Sherman Placer, being a full claim in size running 500 feet northwesterly from center of discovery shaft and 1,000 feet southeasterly from discovery shaft.'

The Helamonster certificate recites that it is in the Pactola mining district, Pennington County, and describes it thus:

> 'Said claim is bounded on the north by Oaxaca lode and lies parallel with said claim, and bounded on the south by the Captain Jack placer and is north of Rapid creek in Boarding House Gulch, being a full claim in size running 600 feet northwesterly from center of discovery shaft and 900 feet southeasterly from center of discovery shaft.' "

The Court in speaking of the certificate said:

> "The descriptions given in the location certificate were not such as to identify the claim with reasonable certainty, which also rendered the location void. Erhardt v. Boaro, 113 U.S. 527, 28 L. Ed. 1113; Marshall v. Mining Co., 1 S.D. 350, 47 N.W. 290; Regan v. Whittaker, 14 S.D. 373, 85 N.W. 863."

In the case of *Faxon v. Barnard,* 4 Fed. 702, the description of the location considered by the Court read as follows:

> "Situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain. Said claim is staked and marked as the law directs."

Of this the Court said:

> "It is utterly impossible to find in this language any reference to a natural object or permanent monument defining the location, *and the only question is as to the effect of the omission.* The act of congress requires such reference to be made in the description of the claim (Rev. St. Sec. 2324), and the state legislature has declared that the certificate shall give 'such description as shall identify the claim with reasonable certainty.' Rev. St. Col. 630. *Compliance with the act of congress would fulfill all that is required by the state, and it may be said that the acts are in perfect harmony.* But, if that were otherwise, there is no doubt as to authority of congress nor as to the purpose of the law in requiring that the claim shall be definitely described."

STATE DECISIONS CONSTRUING SEC. 2324, R. S., AND STATUTES SIMILAR TO THE ALASKA STATUTE.

In *Darger et al. v. LeSieur* (Utah), 30 Pac. 363, 364-365, one of the location notices, which were alike, read as follows:

> "Notice of Location. This is to certify that we, the undersigned, have this day located and claim 1,500 feet in length on this ledge of shale and wax and three hundred feet on each side of the center of location. We claim three hundred feet running east and 1,200 feet running west from monument. We claim all the privileges granted to miners by the laws of the United States and the territory of Utah. This ledge is situated up near the head of the right hand fork of what is known as 'Tie Canyon' and about five miles from the Denver & Rio Grande Railroad, in Utah county, Utah territory, and shall be known as the 'Belcher Lode'."

The Court in commenting upon this notice said (p. 364):

> "We think that the court erred in admitting in evidence plaintiffs' location notices. *They are fatally defective and valid locations cannot be made under them.* Section 2324, Rev. St. U.S., requires that there must be such a description of the claim located, by reference to some 'natural object or permanent monument' as will identify it. Assuming, although it was not proven at the trial, that the Denver & Rio Grande Railway had a track in Utah County, *an officer armed with a writ of restitution* under the verdict and judgment could not, from the description given, put

plaintiffs in possession of their claims. They are described as being about five miles from the railroad tract, but in what direction or from what point on the railroad, is not stated. 'About five miles' from a railroad is very indefinite as to distance. It might possibly be but four or four and a half miles, or it might be five and one-half or even six miles. They are described as being 'up near the head of the right hand fork of Tie Canyon'. The head of the fork of a canyon is a very indefinite and uncertain locality, but these claims are described as not at, but only near, the head of the canyon, but in what direction, or how far away, is left to conjecture. * * *

But, however they may be located as to each other, *it will readily be seen how they could be swung around so as to cover any piece of ground sought to be taken by any one else within a radius of several miles.* We think the descriptions in the locations are not such as is required by the statute." (Citing cases.)

In *Clear Water Short-line Ry. Co. v. San Garde et al.* (Idaho), 61 Pac. 137, the notice described the claim as follows:

"The discovery stake or monument is 600 feet from the mouth of what is known as 'Big Canyon'. Commencing at discovery, running 750 feet southeast to S.E. end center, thence 300 feet south to south cor., thence 1,500 feet to N. west cor., thence 300 feet N.E. to northwest end center, thence 300 feet north to north cor., thence 1,500 feet to east cor., thence 300 feet to south end center, and back to place of beginning."

The Court in considering the objections to this notice said:

> "It is objected by appellant that the location notice of defendants is fatally defective, in that it does not give the direction for the distance of 600 feet from the discovery monument to the mouth of Big Canon creek, the natural object to which it was attempted to tie the claim. * * *
>
> The mouth of Big Canon is the 'natural object or permanent monument' to which it is sought or attempted to tie the location; but no direction is given in the notice, no point or place in the mouth of the Big Canon is designated, and consequently the latitude of the area which might be covered by the locator in surveying or changing his location from the point of discovery is entirely indefinite * * * It does not appear from the record what the width of the canon is. A location 600 feet from the mouth of the canon, without any indication as to the direction from the point of discovery, *would include a swinging privilege which it is the purpose of the statute to void and prevent.* * * * *The location in this case was void.*"

In *Gilpin Co. Min. Co. v. Drake* (Colo.), 9 Pac. 787, 789, the description in question was as follows:

> "Beginning at the westerly end of the Gilpin County Mining Company's property, on the Williams lode, in Lake Gulch mining district; runs thence in a westerly direction a distance fifty feet, to the easterly end of Packard and Updegraph's property, on said lode."

Concerning this notice, the Court said:

"It is conceded that the claims referred to are patented claims, and that they supply the permanent monuments required by the act of congress. Still the reference thereto in the location certificate, and the description of the claim located, are too indefinite to enable the same to be fully identified or its boundaries readily traced from this certificate alone. 'Beginning at the westerly end' of a certain mining claim. At what point on this westerly end? Was it at a corner or in the center or at some other point on the line of its westerly end? The certificate does not tell. 'Runs thence in a westerly direction a distance of fifty feet, to the easterly end of Packard and Updegrath's property, on said lode'. What part of the easterly end of this property did this line intersect? *What kind of monuments, if any, were at the point of commencement* and at the point of closing this easterly and westerly line? Through what part of the Weitbrec location did this line pass? Was it through the center, or along one side line? Where was the discovery situated with reference to this line? To what fixed point in said shaft, or any other part of said claim, tied? It is apparent that no information is furnished by this certificate which would enable any one to trace the boundaries of this claim. *The discovery shaft is tied to nothing definitely, nor is any corner or point of the claim, so far as appears from this record.*

The statute pronounces such a *location certificate void;* there was therefore no error in rejecting it."

In *Mutchmor v. McCarty* (Cal.), 87 Pac. 85, the location notice of the location claim taken from the transcript on appeal is, as follows:

> "Notice is hereby given, that I, James Kennedy, a citizen of the United States, claim fifteen hundred (1500) feet of this quartz vein bearing gold and six hundred (600) feet in width and bound on each corner with stakes and monuments and named the Emerald and I intend to hold and work said claim according to mining laws of the United States situated in Madam Feliz mining district, Calaveras County, State of California.
>
> Dated on the ground this 18 day of June, 1890. The general direction of this claim is northwesterly and southeasterly. Locator James S. Kennedy."

Of the above notice, Chief Justice Beatty, says:

> "This notice is invalid under the act of congress Sec. 2324 R. S. for the reason that it contained no description of the claim by reference to any natural object or permanent monument by which it might be identified."

In the recent case of *Dennis v. Barnett,* 85 P. (2d) 916, 918, the District Court of Appeal of California, in speaking of the requirements of Sec. 2324, Revised Statutes, said:

> "The *essential requirement* is that it shall be so *described and identified that it* **could be found or located from the description by any one interested in so doing, in other words, that the location of the claim can be readily ascertained."**

It is respectfully submitted that the Writ of Certiorari prayed for should be issued so that the judgment of the United States Circuit Court of Appeals, Ninth Circuit, may be reversed by this Honorable Court.

Dated, San Francisco, California,
June 3, 1940.

J. JOSEPH SULLIVAN,
Attorney for Petitioners.

JULIEN A. HURLEY,
CHARLES E. TAYLOR,
JOHN L. MCGINN,
Of Counsel.

(Appendix Follows.)

Appendix

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9237

J. E. Riley Investment Company (a corporation), Harry P. Sheppard, and Harry Donnelley,
Appellants.

vs.

Walter Sakow,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Division Four.

Before: Denman, Mathews and Healy, Circuit Judges.

Healy, Circuit Judge.

The appeal is from a judgment of the District Court for the Territory of Alaska in favor of appellee (plaintiff) in a suit in ejectment and for damages. The verdict and judgment ran against appellants jointly.

The property involved is the Good Hope placer claim, alleged to have been located by appellee in 1930. The amended complaint sets up the title of

appellee, subject to paramount title in the United States, and alleges that the defendants (appellants) unlawfully and in bad faith entered upon the claim and extracted gold therefrom. Appellants filed a joint answer denying generally the averments of the complaint and alleging as an affirmative defense for all of them that the portion of the Good Hope placer from which the values were extracted was included within the boundaries of the North Star and Bluebird claims, allegedly located by appellant Sheppard prior to the location of the Good Hope and held under lease from Sheppard by appellant Riley Investment Company.

Appellant Donnelley was the superintendent of the Investment Company and the operator of its dredge. Appellant Sheppard was vice-president, secretary, and a director of that company, and was a business associate of Donnelley at the town of Flat, located a short distance from the scene of the operations. The proof tended to show that in September, 1934 appellee found the Investment Company's dredge working on the Good Hope and immediately protested to Donnelley and Sheppard. Thereafter he posted trespass notices on his claim. The dredging operations, however, continued until the freeze-up in November, 1934, by which time some $45,000 in placer gold had been extracted from the Good Hope.

Motions for a nonsuit and for a directed verdict were made on behalf of appellants Donnelley and Sheppard on the ground that neither was in the actual possession of the property. The motions were denied and the rulings are assigned as error. During the progress of the trial Donnelley and Sheppard unsuc-

cessfully sought leave to file separate answers, the former for the purpose of disclaiming any right or interest, and the latter for the purpose of denying possession in himself.

The claimed error in these respects is predicated on the territorial statute, §3761 Compiled Laws of Alaska 1933, requiring that actions to recover possession of real property "shall be commenced against the persons in the actual possession of the property".[1] It is argued that the Investment Company was shown to have been in exclusive actual possession under a written lease from Sheppard, hence neither Sheppard nor Donnelley was a proper party defendant. The argument necessitates some further inquiry into the condition of the record.

The precise whereabouts of the Bluebird and North Star claims which Sheppard was said to have located were not conclusively established.[2] The jury may well have believed that, as originally staked on the ground, there was no conflict or overlapping between either of these claims and the Good Hope. There was evidence that as early as 1932 and 1933 Donnelley was familiar with the Good Hope claim, and that appellee had sampled it at Donnelly's suggestion with the view of its possible acquisition or lease by the Investment Company. Donnelley at that time made no claim that the ground was covered by Sheppard's locations, notwithstanding the latter were said to have been then under lease to his company.

---

1. The statute provides that any person with a legal estate in real property and a present right of possession "may recover such possession with damages for withholding the same", etc.

2. Some of the proof tended to show, also, that these locations were invalid.

In connection with the subsequent invasion of the Good Hope, there are circumstances warranting the belief that there was a concert of action among all three appellants. Sheppard, under his own version of the matter, had a royalty interest in the recovery, and there is some evidence that Donnelley represented him at the cleanups. The gold extracted from the Good Hope was taken by Donnelley and placed in his bank at Flat. It is inferable that Donnelley, who was the chief actor, was agent not alone for the Investment Company but for Sheppard as well. In this posture of the evidence it was not error to refuse to instruct a verdict for the individual defendants. 63 C.J. 936.

In denying the motion for leave to file separate answers during the progress of the trial, the court called attention to the fact that the case had been at issue for some years and had previously been three times tried. Also, that the individuals had defended jointly with the corporation throughout the course of the litigation and had sought to justify on the basis of the claimed locations of Sheppard. The court concluded that it was too late for appellants to do otherwise than "stand or fall" on their joint defense. The application for leave to plead separately was addressed to the sound discretion of the trial court, and under the circumstances we find no reversible error in the denial of the application.

There was a motion for a directed verdict in favor of all the defendants, bottomed on the asserted invalidity of the certificate of location of the Good Hope. The denial of the motion is assigned as error.

The argument in this respect is that the certificate failed to describe the claim with reference to some natural object or permanent monument, as required by the territorial statute. Ch. 10, Session Laws Alaska 1915.

The case was heretofore before this court on an appeal from an earlier judgment, 98 F. (2d) 8. The certificate is set out verbatim in our opinion on that appeal. The claim is described as being situate on the right limit of Otter Creek, a tributary of the Iditarod River, Otter Recording Precinct. This as the evidence shows is a featureless locality. There was testimony that the initial stake of the Good Hope measured about six by eight inches from top to bottom and had been blazed on four sides. It was four or five feet in height above the surface and was firmly embedded in the ground, so firmly that it had remained in place from the inception of the location to the time of the trial in 1938. The same is true of post No. 2. Both posts were plainly visible from the valley of the creek and each bore appropriate markings.

The jury were instructed that a post or stake may be a permanent monument sufficient to satisfy the legal requirement as to identification, provided it is of a substance fairly permanent, is firmly planted in the ground, and can be readily seen and identified by a person honestly seeking to find the claim. The court left for the determination of the jury the question whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument. This was proper, and the instructions given on the subject were correct. Hammer v. Gar-

field M. & M. Co., 130 U.S. 291; Bismark Mountain Mining Co. v. North Sunbeam Co., 14 Idaho 516, 95 P. 14; Credo Mining Co. v. Highland M. & M. Co., 95 Fed. 911; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 666-679.

Error is predicated on the overruling of objections to testimony of appellee concerning the conduct and declarations of Donnelley while negotiating with him for prospecting and leasing the Good Hope claim. The argument is that the testimony was in derogation of Sheppard's title and was inadmissible as against Sheppard. This may be conceded for the purpose of deciding the point. The question of title was not the sole issue, however. Also involved was the question of bad faith. The jury were at liberty to find against one or more of the defendants on this issue and to absolve the others of an intentional trespass. They were so charged by the court. On the issue of *mala fides* the testimony was clearly admissible as against both Donnelley and the Investment Company. There was no request for an instruction limiting the evidence to its appropriate purpose, and the point must be deemed waived. §3591, sub. 5, Compiled Laws of Alaska 1933; Wigmore on Evidence (2d Ed.), §13, pp. 159, 160.

These were the principal questions urged in briefs and oral argument. Other errors were assigned, but we find none warranting a reversal.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1940. Paul P. O'Brien, Clerk.

Due service and receipt of a copy of the within is hereby admitted

this_____day of June, 1940.

_____

_____

Attorneys for Respondent.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

FILED
JUL 10 1940
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1939

No. 127

J. E. RILEY INVESTMENT COMPANY (a corporation), HARRY P. SHEPPARD and HARRY DONNELLEY,
Petitioners,

vs.

WALTER SAKOW,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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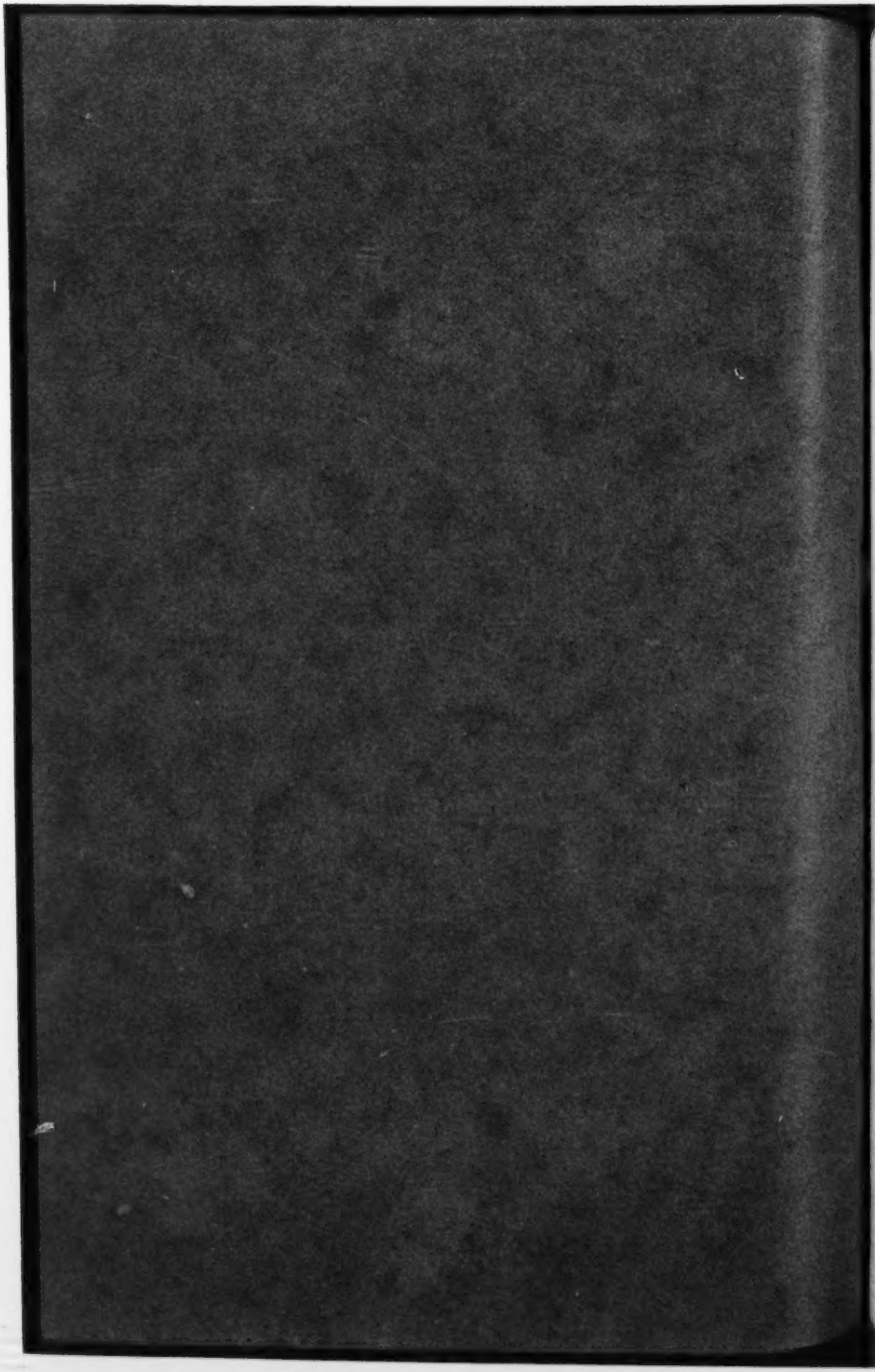

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I.

STATEMENT.

The respondent, Sakow, as plaintiff in the District Court for Alaska, recovered judgment (on a verdict) against the defendants (petitioners here) from which they appealed to the United States Circuit Court

(NOTE): All italics ours, unless otherwise indicated.

of Appeals, Ninth Circuit. The judgment was reversed because of errors in instructions, and the case sent back for new trial. (98 F. (2d) 8) (July 5, 1938.) This is hereinafter referred to as the "first appeal".

On new trial, Sakow again was successful and from the judgment (again on a verdict) in his favor petitioners appealed to the Circuit Court of Appeals, which affirmed the judgment. (110 F. (2d) 345) (March 14, 1940.) This is hereinafter referred to as the "second appeal".

It is to review the decision and opinion rendered and given on the "second appeal" that petitioners are before this Court. (Pet. 2.)

II.

ARGUMENT.

1. The Petition Confuses the First and Second Appeals.

The immediate impression gained from reading the Petition herein is one of confusion. This is augmented rather than cleared by the statement of questions which the Petition presents to this Court (Pet. 5-6):

> "The questions sought to be reviewed by this petition are first: Is a certificate of location that describes a placer mining claim, as:
>
> " 'being from this initial stake 1320 feet down stream to post no. 2. thence 660 feet cross the creek to post no. 3 thence 1320 feet up stream to post no. 4. thence 660 feet back to this Initial Stake.
>
> " 'this claim is situated on the right limit of Otter creek a Tributary of Iditarod River Otter recording precinct fourth division Territory of Alaska, to be known 'Good Hoppe' claim. (R. 52),
>
> "sufficient to meet the requirements of Sec. 2324, Revised Statutes of the United States, which provides, that:
>
> " 'All records of mining claims * * * shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.'?
>
> "Second: May a subsequent locator intrude and trespass upon a placer mining claim in the actual possession of another, under claim and color of title, and make his wrongdoing successful, by

asserting 'flaws' in the title of the one against whom the wrong has been, by him, committed?"

As to the "first" question—the sufficiency of Sakow's Certificate of Location—the facts on which its sufficiency is based were found in his favor by the jury in the District Court. Furthermore, its validity in law is not based solely on Section 2324 of the *Revised Statutes of the United States,* as the above "first" question would seem to imply, but principally on a Territorial Statute which supplements the former. (*Session Laws of Alaska 1915* Ch. 10. See Appendix to this Brief.)

As to the "Second" question, it is made to appear from its context that Sakow trespassed and intruded upon the claims of petitioners. As a matter of fact, petitioners trespassed on Sakow's claim, the Good Hope,[1] and in his action of ejectment against them, they sought to defend by showing that his Certificate of Location was not valid and that in locating his Good Hope claim he had included within it a part of their Blue Bird and North Star claims. These matters were resolved against them by the verdict and judgment. (R. 16.)

To further increase the confusion, petitioners now specifically attack the decision and opinion of the Circuit Court of Appeals given on the *first appeal,* as to the validity of Sakow's Certificate of Location,

1. The Circuit Court of Appeals, in its opinion on the second appeal (Appendix to the Petition p. iv), and reported in 110 F. (2d) 345, refers to the trespass as "the subsequent invasion of the Good Hope".

even though their Petition does not seek to have it reviewed.[2] (Pet. 11-16.) They now discuss this matter at great length,[3] but at the time the decision came down (first appeal, July 5, 1938) they entered no objection whatever to it; they did not move to modify it, nor did they file a petition for rehearing. As a matter of fact, they accepted all of the benefits of the decision which they now repudiate. It awarded them a new trial, which was had, but now that the verdict and judgment have gone against them, and this time were affirmed by the Circuit Court of Appeals, they boldly assert that the Court, on the first appeal, should not have ordered a new trial and should not have ordered submitted to the jury the issue as to the sufficiency of Sakow's Certificate of Location; that in so doing, the Court erred. (Pet. 11.)

2. The Petition is specific. It says: "Petitioners pray that a Writ of Certiorari issue to review *the judgment* of the Circuit Court of Appeals for the Ninth Circuit *entered into the above entitled cause on 14th day of March, 1940;*" i. e., the *second appeal.* Pet. 1.)

3. Counsel consume approximately eighteen pages of the thirty page Petition herein and all of the supporting Brief in a discussion of the validity of Sakow's Certificate of Location. The "Second" question presented by the Petition is abandoned entirely in the supporting Brief.

2. The Validity of Sakow's Certificate of Location Was Res Judicata and Stare Decisis on the New Trial.

It is obvious that the decision and opinion of the Circuit Court of Appeals given on the first appeal of this case (98 F. (2d) 8) as to the validity of Sakow's Certificate of Location, involving the same parties and the same subject matter, was *res judicata* and *stare decisis,* absolutely binding upon the District Court on the new trial.

In that decision the Court used this precise and lefinite language:

> "The 'stake' and 'posts' referred to in the claim may or may not be permanent monuments and it was for the jury to determine their permanency from the evidence produced. * * *
>
> "We hold that, otherwise than in the absence of a description of one of the stakes as a permanent monument, which may be shown at the trial, the plaintiff's certificate of location is valid in form and content."

When the case was tried anew, evidence was introduced as to the permanency of the stakes. The question whether any of the stakes constituted a permanent monument was left to the jury, which resolved it in Sakow's favor. (R. 15.)

When the matter reached the Circuit Court of Appeals on the *second appeal* (110 F. (2d) 345), that Court, in commenting on the evidence relating to this phase of the case, referred to the right limit of Otter Creek, where Sakow's Good Hope claim is situated, and said:

"This as the evidence shows is *a featureless locality.* There was testimony that the initial stake of the Good Hope measured about six by eight inches from top to bottom and had been blazed on four sides. It was four or five feet in height above the surface and was firmly imbedded in the ground, so firmly that it had remained in place from the inception of the location to the time of the trial in 1938. The same is true of post No. 2. Both posts were plainly visible from the valley of the creek and each bore appropriate markings.

"The jury were instructed that a post or stake may be a permanent monument sufficient to satisfy the legal requirements as to identification, provided it is of a substance fairly permanent, is firmly planted in the ground, and can be readily seen and identified by a person honestly seeking to find the claim. *The court left for the determination of the jury the question whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument. This was proper, and the instructions given on the subject were correct.*"[4]

Thus, the trial court followed the "law of the case" as laid down by the Circuit Court of Appeals on the *first appeal,* which it affirmed again on the second appeal.

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4. The Court here cited, among other cases, *Hammer v. Garfield M. & M. Co.,* 130 U. S. 291. In their Brief (p. 46), supporting the Petition herein, counsel set forth a long quotation from the *Hammer* case, but they significantly omit the following language which this Court used in that case and which precedes the part they quoted: "These provisions as appears on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. *Of course this section means, when such reference can be made.*"

The petitioners were fully aware that on new trial they were bound by the "law of the case" as set forth in the opinion of the Circuit Court of Appeals on the first appeal. In their Brief, filed in the Circuit Court of Appeals on the second appeal, at page 46, they make the following statement:

> "This court, on the former appeal, held that this notice 'is valid as to form and content', 'otherwise than in the absence of a description as to one of the stakes as a permanent monument, which may be shown at the trial' (98 F. (2d) 8, 11).
>
> *"We take it that the court's former opinion is 'the law of the case', and that the question of the sufficiency of the notice 'as to form and content' is not open to consideration. That the only question that can now be considered is as to whether 'one' of the stakes mentioned in the notice is a permanent monument* within the meaning of the law that requires the record to refer to a permanent monument 'as will identify the claim'.
>
> "The determination of this question depends upon the nature of the posts and stakes mentioned in the notice. The evidence discloses * * *"

It is obvious that petitioners have now abandoned the position they lately took in the Circuit Court of Appeals. There, they were ready to argue and submit as

> "the only question that can now be considered * * * whether one of the stakes is a permanent monument * * *"

Now, for the purposes of their Petition, they challenge the right of the Circuit Court of Appeals to have ordered that question submitted to the jury and here they assail its action as error.

The fact of the sufficiency of the stakes, any one of them, to constitute a permanent monument was found in favor of Sakow and against the petitioners by the District Court and the Circuit Court of Appeals. This Court has repeatedly held

> "that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous."
>
> *The Germanic,* 196 U. S. 589;
>
> *Wafferman v. The Carib Prince,* 170 U. S. 655.

3. In Any Event Sakow's Certificate of Location Is Sufficient in Fact and Valid in Law.

Sakow's Certificate of Location, in any event, in fact and in law, is valid and sufficient. Its validity is determined by the appropriate provisions of the applicable Territorial law of Alaska and not by the general mining enactments of Congress.

It is obvious that petitioners' reference to Section 2324, *Revised Statutes of the United States,* is to inject a "Federal question" into the case so as to give some semblance of a basis for their Petition for Certiorari. They set forth the provisions of this Section relating to the "records" of mining claims, but in doing so they are somewhat careless in the citation and in the use of quotation marks. The Statute, quoted at the bottom of page 6 and the top of page 7 of their Petition, is from Section 22 and not Section 28 of Title 30, *U. S. C. A.* Furthermore, Section 22 does not commence with the words "All valuable mineral deposits", as they quote it, but with the words "*Except as otherwise provided* all mineral deposits * * *".[5] Nor is the quotation which appears in italics at the bottom of page 7 of their Petition correct. It purports to be from *U. S. C. A.* Title 30, Section 28, p. 151, and it includes, as quoted words, the following:

"when required by local rules or customs"

These words, however, are not a part of Title 30, Section 28, *U. S. C. A.*

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5. The complete Section appears in the Appendix to this Brief.

This enactment of Congress (R. S. Sec. 2324, Title 30, *U. S. C. A.* Sec. 28) is the basis for later Territorial Statutes. If these Statutes require a certificate of location to be recorded, then the recorded certificate "shall" contain the matters set forth in Section 28. That this is well known to counsel appears from their Petition for Rehearing, filed in the Circuit Court of Appeals after the decision on the second appeal. They say (p. 8):

> "*The Congressional Mineral Laws of the United States do not in terms require a certificate or notice of location to be recorded. It is only when such certificate or its equivalent is required to be recorded by state or territorial laws or local rule that the provisions of the Federal law become mandatory.* And when the state or local laws or rules require a record to be made it must contain at least the elements provided for by Sec. 2324, Revised Statutes, and if such state or local laws prescribe the contents of the recorded notice, it must comply with this additional requirement."

In line with this, counsel likewise well know that the Territorial Law in effect when Sakow located his Good Hope claim (Oct. 27, 1930; i. e., the *Act of 1915*) *did not require* a certificate of location to be recorded. Therefore, their statement in this regard, as well as their argument supporting it, is misleading:

> "In Alaska, therefore, the recording of a certificate of location is an essential act of location and mandatory; and, failure of the certificate, to reasonably comply therewith, invalidates the location." (Pet. 9.)

Under the 1915 Act (Appendix) the recording of a certificate of location is *permissive and directory but not mandatory.* The language of the Act is:

> "A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to re-location; provided, that if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator."

Thus, it will be noted, failure to record such certificate is deemed an abandonment only if, before the certificate is recorded, another person performs all of the acts of location by a full compliance with the Statute. There is no evidence anywhere in the Record of any attempted location of the Good Hope *subsequent* to Sakow's location October 27, 1930.[6] Therefore, the recording by Sakow of his Certificate of Location was not an essential nor a necessary step for him to take to completely perform his act of locating the Good Hope.

In 1931 the Territorial Legislature repealed the *Act of 1915.* (*Session Laws of Alaska 1931* Ch. 64.) Thereafter there was no territorial law making the recording of a location certificate either a directory or mandatory step in locating a claim, nor was there

6. Petitioners claim to have located their North Star and Blue Bird claims on July 6, 1926, and that Sakow's later Good Hope location overlapped their claims.

any act of Congress, relative to Alaska, requiring the locator of a mining claim to record a certificate of location.

Therefore, under the law in effect (*Territorial Act of 1915*) when he located the Good Hope, Sakow had a right to record a location certificate at any time before there was an intervening location by another person, and since there never was such an intervening location, that right continued until the 1915 Act was repealed in 1931. Thereafter, only the general laws of the United States governed, and since those laws did not require, as a necessary part of the act of location, the recording of a certificate of location, Sakow could have proceeded to trial without ever having recorded his Certificate of Location. This was clearly stated by the trial judge in his opinion denying the Motion for New Trial. (R. 391 et seq.)

As a matter of fact Sakow did record his Certificate (R. 53) and because he did so, even though under the law in effect at that time it was not mandatory, petitioners now seek to invoke Section 2324 *R. S.* and its provisions as to what a recorded certificate must contain in those cases where a local law *requires* the certificate to be recorded.

In this connection, also befogging the issue, is another misleading assertion by counsel, relating to the *Territorial Act of 1913.* (*Session Laws of Alaska 1913* Ch. 74.) They say:

> "This Act, inter alia, required certificates of locations of mining claims to be recorded and prescribed their content. *The Act was substan-*

> *tially the same as the Act of 1915,* by which, in conjunction with Sec. 2324, Revised Statutes, the validity of appellee's certificate of location must be tested." (Pet. 20.)

It is true that the *Act of 1913* required certificates of location to be recorded, but it is a misstatement to say that this Act "was substantially the same as the Act of 1915", which we have shown, supra, made no such requirement.

Furthermore, petitioners, with admitted knowledge of the situs of Sakow's Good Hope claim, could not have been misled by any imperfections in his recorded Certificate of Location even if such imperfections existed. (*Butte and Superior Copper Co. v. Clark-Montana Realty Co., et al.,* 249 U. S. 27; *Yosemite Mining Co. v. Emerson,* 208 U. S. 25.) Donnelley, one of the petitioners, was on Sakow's Good Hope claim four or five times when he requested Sakow to sample it with the view of its possible acquisition or lease by another of the petitioners, Riley Investment Company, if the samples showed sufficient values. (R. 182-187.) It is obvious that the markings, corners, stakes, dimensions and extent of Sakow's claim were well known to the petitioners.

Also, as to petitioners, there is the question of bad faith to be considered. This is mentioned in the opinion of the Circuit Court of Appeals on the second appeal (Appendix to Petition) where the Court says:

> "In connection with the subsequent invasion of the Good Hope, there are circumstances warranting the belief that there was a concert of

action among all three appellants. Sheppard, under his own version of the matter, had a royalty interest in the recovery, and there is some evidence that Donnelley represented him at the cleanups. The gold extracted from the Good Hope was taken by Donnelley and placed in his bank at Flat. It is inferable that Donnelley, who was the chief actor, was agent not alone for the Investment Company but for Sheppard as well. * * *

"The question of title was not the sole issue, however. *Also involved was the question of bad faith.* The jury were at liberty to find against one or more of the defendants on this issue and to absolve the others of an intentional trespass. They were so charged by the court. On the issue of mala fides the testimony was clearly admissible as against both Donnelley and the Investment Company."[7]

The petitioners knew the situs of Sakow's Good Hope claim, and have never claimed, and make no contention now, that the lines of his claim were not "distinctly marked on the ground so that its boundaries can be readily traced" as required by the provisions of Title 30 *U. S. C. A.* Section 28. Their sole contention seems to be that he was required to record a certificate of location and that such recorded certificate does not show that the claim was tied to any permanent monument or natural object, as required by the *Territorial Act of 1913.* We have shown, supra, that the 1913 Act has no application whatever to

7. It is significant also that the Record may be searched in vain for the testimony of Donnelley "who was the chief actor". He did not offer himself as a witness in the proceedings.

Sakow's recorded Certificate and that under the applicable *Territorial Act of 1915* a recorded certificate of location was not required, and that the jury decided in Sakow's favor, that one or more of his stakes constituted a "permanent monument".

The "first" matter, therefore, which the Petition herein seeks to have reviewed, does not pose a Federal question, substantial or otherwise.

4. Petitioners Trespassed on Sakow's Good Hope Claim. He Did Not Trespass on Their Blue Bird or North Star Claims.

The "Second" question which the Petition herein seeks to have reviewed (Pet. 6) they have abandoned and not mentioned in the Brief supporting the Petition. The question is so phrased, it is made to appear therefrom that Sakow intruded and trespassed upon the claims of petitioners. The reverse is true. The situs of Sakow's Good Hope claim, as before stated, was well known to them and was not challenged. The exact situs of the Blue Bird and North Star claims, however, was not definitely known nor proved, and this fact was noted by the Circuit Court of Appeals in its opinion on the second appeal. The Court says:

> "The precise whereabouts of the Blue Bird and North Star claims which Sheppard was said to have located were not conclusively established.[8] The jury may well have believed that, as originally staked on the ground, there was no conflict or overlapping between either of these claims and the Good Hope."

Obviously, if there was no overlapping, then Sakow was not trespassing on petitioners' claims.

In commenting on the trial court's refusal to instruct the jury as to one phase of Sakow's alleged trespass on their claims, petitioners say:

> "The only allusion, by the Circuit Court of Appeals to this vital question, is the statement 'Other

8. "Some of the proof tended to show, also, that these locations were invalid."

> errors were assigned but we find none warranting a reversal'." (Pet. 27.)

This statement is misleading because reference to the Court's opinion (found in the Appendix to the Petition), shows that it is only half of what the Court actually said, which was as follows:

> *"These were the principal questions urged in briefs and oral argument.* Other errors were assigned, but we find none warranting a reversal."

As in their Brief and on oral argument before the Circuit Court of Appeals, so in their Brief supporting their Petition here, petitioners abandoned the point which is the "Second" question the Petition asks this Court to review.

III.

CONCLUSION.

The jury, in awarding the verdict to Sakow, found him to be the owner of the Good Hope claim, as described in the amended Complaint; that the petitioners trespassed thereon; that he is entitled to recover damages for such trespass and the taking of gold therefrom. (R. 15.) The jury also inferentially found one or more of the stakes of the Good Hope claim to constitute a permanent monument, and that Sakow was not a trespasser on petitioners' claims.

Thus, neither of the matters which the Petition seeks to have reviewed herein presents a question cognizable by this Court in these proceedings, and the Petition should be denied.

Dated, San Francisco, California,
July 6, 1940.

Respectfully submitted,
CECIL H. CLEGG,
HERMAN WEINBERGER,
Attorneys for Respondent.

(Appendix Follows.)

Appendix

SESSION LAWS OF ALASKA 1915.
SECTIONS 1 AND 2 OF CHAPTER 10.

AN ACT

To Supplement the mining laws of the United States in the Territory of Alaska and to repeal an Act, entitled, "An Act to Supplement the mining laws of the United States in the application to the Territory of Alaska; providing for the location and possession of mining claims in Alaska and repealing all acts and parts of acts in conflict herewith to the extent of such conflicts", approved April 30, 1913.

Be it Enacted by the Legislature of the Territory of Alaska:

Section 1. Any person qualified under the laws of the United States, who discovers upon the public domain within the Territory of Alaska, a placer deposit of gold, or other mineral which is subject to entry and patent under the mining laws of the United States, may locate a mining claim thereon in the following manner, to-wit:

1st. He shall post, or write upon the initial post, stake or monument on the claim, a notice of location containing:

a. The name or number of the claim.

b. The name of the locator or locators.

c. The date of discovery and of posting notice on the claim.

d. The number of feet in length and width of the claim.

This notice shall be known as the location notice.

2nd. He shall distinctly mark the location on the ground so that its boundaries can be readily traced, by placing at each corner or angle thereof substantial stakes, or posts, not less than three feet high above the ground and three inches in diameter, hewed on four sides; or by placing at each corner or angle thereof mounds of earth or rock not less than three feet high and three feet in diameter and the stakes, posts or monuments so used must be marked with the name or number of the claim and the designation, by number, of the corner or angle. The initial stake or monument, shall be one of the corner stakes, posts or monuments of the claim located.

If the claim is located on ground that is covered wholly or in part with brush or trees, such brush or trees shall be cut or blazed along the lines of such claim, so as to be readily traced.

If located in an open country, the boundary lines shall be located by placing line stakes or line monuments so as to be readily traced from corner to corner of said claim.

Section 2. Within ninety days after the discovery and posting of the notice aforesaid, the locator shall record with the Recorder of the District wherein such claim is situated, a certificate of location. Such certificate shall contain:

(a) The name or number of the claim.

(b) The name of the locator or locators.

(c) The date of discovery and of posting of the location notice.

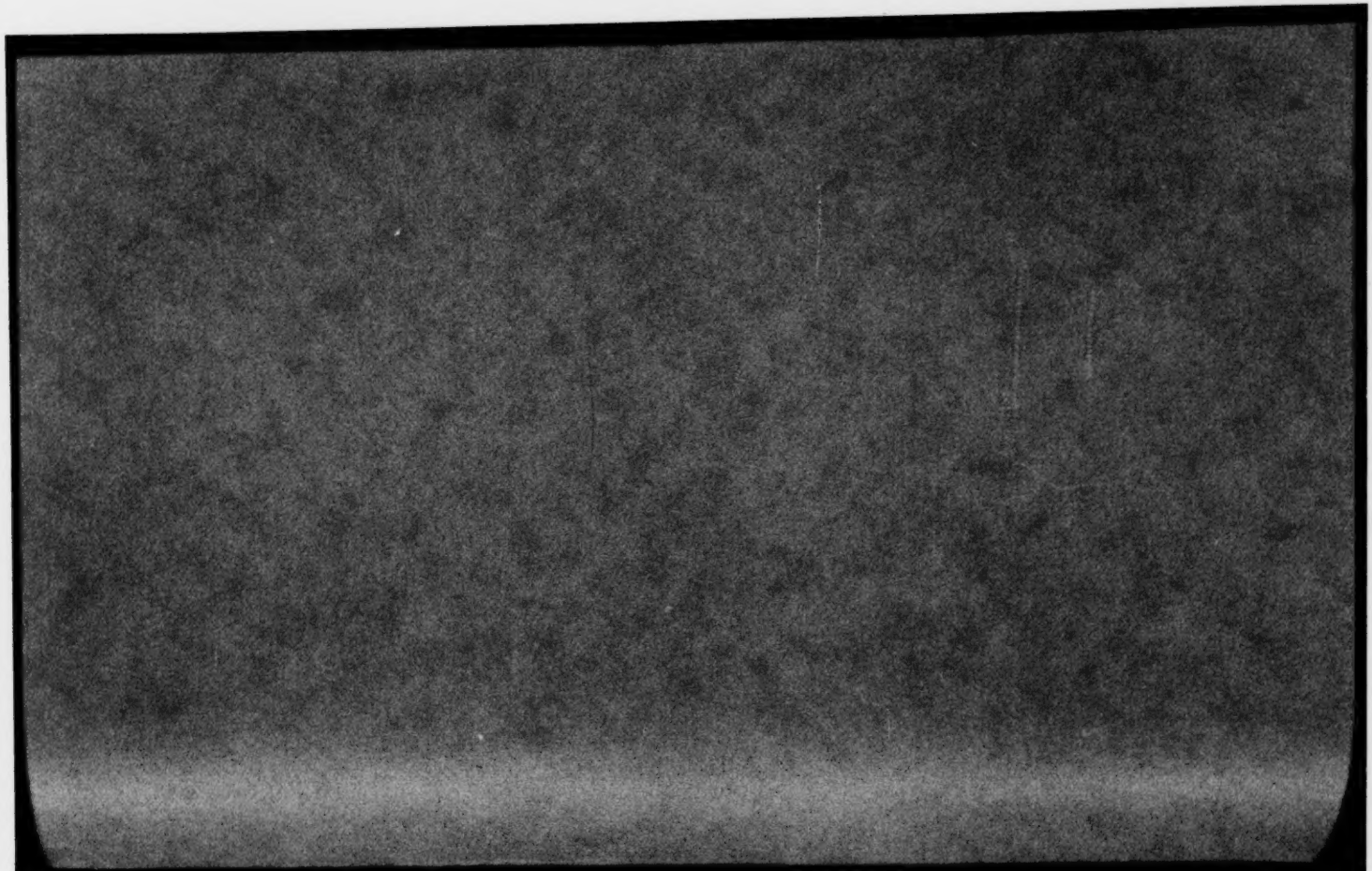
(d) The number of feet in length and width of claim.

(e) It shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments.

A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to re-location; provided, that if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator.

TITLE 30, U. S. C. A., SECTION 22.

22. *Lands open to purchase by citizens.—Except as otherwise provided* all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R. S. 2319; Feb. 25, 1920, c. 85, 1, 41 Stat. 437.)



Due service and receipt of a copy of the within is hereby admitted

this _____ day of July, 1940.

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Attorneys for Petitioners.